

**The Federal Trade Commission in the Online World:
Promoting Competition and Protecting Consumers**

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I. Introduction

Thank you. I am delighted to be here with you today in beautiful Aspen. I thank Ray Gifford and Dan Caprio for their gracious invitation to speak at this event. Ray, I congratulate you on your nearly four-year tenure at the helm and thank you for your valuable work in fostering thoughtful and timely policy discussions. From the first time we spoke, I knew that I had met a genuine champion for market forces. Dan, congratulations to you on assuming the presidency; we are proud that an FTC alumnus and another strong market champion will be taking the reins.

The Internet has created enormous benefits for consumers through increased convenience, choice, and efficiency. It empowers consumers by providing them easy access to large amounts of information, allowing them to quickly research and compare product attributes and prices and to purchase products and services from all over the country or even the world without leaving home. The expanded choices and increased information that the Internet offers have intensified competition in a number of markets, all of which benefits consumers. Retail

¹ The views expressed herein are my own and do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner.

book stores and music sellers must compete with on-line sellers; wine shops now must compete with wine sellers throughout the country; traditional real estate agents face competition from online agents and even home sellers themselves, thanks to the Internet; and virtually all sellers of retail goods must compete with the market for used goods, as consumers now can buy from and sell to one another with ease.

The Federal Trade Commission's job is to protect this vital competition, by rooting out anticompetitive business conduct; by "outing" anticompetitive government policies and practices; by ensuring that consumers are receiving accurate market information; and by ensuring that consumers' own personal information is protected from unauthorized access in the marketplace. We do this through, first and foremost, law enforcement. But we also advocate for sound federal and state policies that do not inhibit competition and the free workings of the market; educate consumers and businesses about marketplace issues and laws; and conduct research to inform our own work, as well as that of other policymakers.

Our work in the Internet marketplace has included: filing nearly 90 cases against 240 individuals and companies who bombarded consumers with endless spam, most of it fraudulent; stopping harmful spyware that hijacked computers, altered home pages, barraged consumers with pop-up ads, and installed software programs that spied on consumers' Web surfing; and filing more than a dozen data security cases against companies that either failed to take reasonable security measures to protect sensitive customer information or that made deceptive

security claims.²

Government policies, too, can restrict or distort competition in ways that harm the market and consumers, and, indeed, government-imposed restrictions are among the most durable and effective restraints on competition. Take, for example, Internet wine sales, a growing and potentially important alternative to the traditional tightly-regulated, three-tiered system of producers, licensed wholesalers, and retailers. Many states still ban or severely restrict the direct shipment of wine to consumers. As part of its ongoing program to identify regulatory barriers to competition that harm consumers, the FTC staff took an in-depth look at the effect of online wine sales and concluded that states could significantly enhance consumer welfare by allowing the direct shipment of wine as a purchase option. In doing so, FTC staff rebutted state claims that their laws advanced legitimate purposes, such as shielding minors from ordering wine online.³ Last year, the Supreme Court in *Granholm v. Heald*⁴ cited the FTC report when it

² New technologies have globalized the marketplace and created enormous benefits for consumers and competition. But the global electronic marketplace also has led to a dramatic increase in cross-border fraud. In June 2005, the FTC submitted a report to Congress recommending the enactment of the US SAFE WEB Act. This legislation would give the FTC access to a broader range of investigative sources about Internet and other cross-border fraud. In addition, the US SAFE WEB Act would enable the FTC to share key information with foreign law enforcers, thereby helping them to take action against cross-border fraud that harms U.S. consumers, including modem hijacking scams, Internet auction fraud, deceptive spam and spyware, and identity theft. The Senate passed this critical legislation last March.

³ This summer, Teenage Research Unlimited (“TRU”) issued the results of a survey it conducted of 1,001 people aged 14-20 during early 2006, in which two percent of the respondents reported having purchased alcohol online. See Teenage Research Unlimited, *Research Findings: Underage Alcohol Access & Consumption: Internet, Phone, and Mail* 16 (Summer 2006) (sponsored by wholesalers), at <http://www.wswa.org/public/media/tru-research/TRUSurvey080206.pdf>. The TRU survey does not distinguish among different types of alcohol, so it is unclear how many of the respondents’ purchases were of wine versus beer or hard liquor. However, because the TRU survey reports

rejected states' justifications for discriminatory restrictions on interstate wine sales.

II. The FTC and Broadband Internet Access Services

While the easy access to information, products, and service offered by the Internet and other technologies clearly holds enormous benefits for consumers, the rapid pace of development and convergence, as well as recent regulatory developments in the telecommunications industry, also raise many significant and complex issues. The approach that policymakers take on these issues will shape, or at least significantly impact, the affected industries for the foreseeable future. In current discussions about future policy and legislation, some have asked whether the FTC has jurisdiction over broadband Internet access services. As you may know, “common carriers” that provide telecommunications services and are subject to the Communications Act are exempt from the FTC Act.⁵ In both a letter to the House Judiciary Committee and testimony

that hard liquor and beer are the types of alcohol most frequently consumed by minors, it is reasonable to assume that online purchases of wine comprise only a fraction of the respondents' purchases. *See id.* at 18. Further, the TRU survey does not indicate whether the availability of wine online has increased underage consumption above levels that otherwise would exist. FTC research to date has not found evidence that online shipment is likely to increase underage consumption of wine. *See* POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 34 (2003), at <http://www.ftc.gov/os/2003/07/winereport2.pdf>. Additionally, in *Granholm v. Heald*, the Supreme Court concluded that there was no concrete evidence that direct shipment of wine is likely to increase alcohol consumption by minors. 544 U.S. 460, 490 (2005). However, underage drinking is a serious concern, and staff currently are examining the TRU survey more closely.

⁴ *Granholm v. Heald*, 544 U.S. 460 (2005).

⁵ The FTC Act provides that “common carriers subject to the Communications Act of 1934” as amended are exempt from the FTC Act. 15 U.S.C. §§ 45(a)(2), 44. At common law, common carriage is characterized by the offering of a service of carrying for the public generally and without modification of the content of what is carried. *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 640-42 (D.C. Cir. 1976) (“*NARUC I*”); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (“*NARUC II*”); *FTC v.*

before the Senate Judiciary Committee,⁶ we explained in response to direct questions that broadband Internet access services are within the FTC's jurisdiction. Certain types of Internet access services have long been treated as non-common carrier services subject to FTC jurisdiction. These include digital subscriber line (DSL) Internet access provided by ISPs that do not themselves own the transmission facilities used to provide Internet access, as well as dial-up or narrowband Internet access.

Recent developments in the courts and at the FCC have clarified that certain other means of providing Internet access – specifically, cable modem services and facilities-based broadband wireline services offered on a non-common carrier basis – are information services rather than telecommunications services.⁷ In the *Brand X*⁸ decision, the Supreme Court upheld the FCC's

Verity Int'l, Ltd., 443 F.3d 48, 57-58 (2d Cir. 2006). However, an entity is treated as a common carrier under the Communications Act only with respect to services it provides on a common carrier basis. *NARUC I*; *NARUC II*; see also 47 U.S.C. §§ 153(43), (44), (46) (“A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services. . . .”). The Communications Act specifically distinguishes between “telecommunications services,” which are services provided on a common carrier basis, and “information services,” which are not. To the extent an entity provides non-common carrier services such as “information services,” the provision of those services is subject to the FTC Act's prohibitions against engaging in deceptive or unfair practices and unfair methods of competition. See *FTC v. Verity Int'l Ltd.*, 194 F. Supp. 2d 270, 274-77 (S.D.N.Y. 2002) (order denying defendants' motion for judgment on the pleadings and granting plaintiff's motion to extend preliminary injunction), *aff'd*, 335 F. Supp. 2d 479, 494 (S.D.N.Y. 2004), *aff'd in part, rev'd in part*, 443 F.3d 48 (2d Cir. 2006).

⁶ See Prepared Statement of the Federal Trade Commission on FTC Jurisdiction over Broadband Internet Access Services, Presented by Commissioner William E. Kovacic before the Committee on the Judiciary, United States Senate (June 14, 2006), available at <http://www.ftc.gov/opa/2006/06/broadband.htm>.

⁷ During its two most recent reauthorization hearings before Congress, the FTC proposed eliminating the gap in its jurisdiction created by the telecommunications common carrier exemption, because the exemption is outdated and an obstacle to good policymaking. As

determination that cable modem Internet access service is an “information service” and not a telecommunications service under the Communications Act. Subsequently, the FCC released its *Wireline Broadband Internet Access Order*,⁹ in which the agency reclassified wireline broadband

illustrated by the broadband Internet access marketplace, technological advances have blurred the traditional boundaries among telecommunications, entertainment, and high technology. As these areas continue to converge, the common carrier exemption is likely to frustrate the FTC’s ability to stop deceptive and unfair acts and practices and unfair methods of competition with respect to interconnected communications, information, and entertainment services. For example, providers routinely offer bundles of telecommunications and non-telecommunications services, such as bundling phone service with internet access through DSL. The FTC has authority over the DSL service offered by the provider but attempting to assert jurisdiction over only the DSL portion of the package of phone and internet access services may be difficult. Even if the FTC were to undertake such an action – which would require enormous resources just to parse the jurisdictional complications – it would fail to address the entire problem.

Enforcement difficulties posed by the common carrier exemption are not speculative. A recent decision of the Second Circuit, *FTC v. Verity Int’l Ltd.*, 335 F. Supp. 2d 479 (S.D.N.Y. 2004), *aff’d in part, rev’d in part*, 443 F.3d 48 (2d Cir. 2006), offers an example of how some defendants attempt to thwart FTC enforcement actions by asserting that the common carrier exemption precludes FTC action. In that case, the defendants had orchestrated a scheme known as “modem hijacking,” in which they disconnected consumers’ computers from their regular ISPs and reconnected their modems to a Madagascar phone number for purposes of providing online entertainment. The line subscriber of the modem phone line was then charged \$4 to \$8 per minute for the length of the connection. AT&T and Sprint carried the calls that connected the consumers’ computers to the defendants’ servers. Based on the common carrier exemption in the FTC Act, the defendants argued that because AT&T and Sprint carried the calls, the entertainment service for which consumers were billed was outside the FTC’s jurisdiction. One defendant also claimed to be a common carrier and therefore wholly exempt from the FTC’s jurisdiction. Although both the District Court and the Court of Appeals rejected those arguments, the FTC continues to expend substantial time and resources litigating the issue. The FTC’s enforcement capabilities, and ultimately American consumers, would benefit if Congress repealed the telecommunications common carrier exemption from the FTC Act.

⁸ *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, __ U.S. __, 125 S. Ct. 2688 (2005).

⁹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 14853 (2005) (*Wireline Broadband Internet Access Order* or *Order*), available at

Internet access service by facilities-based carriers as an information, rather than a telecommunications, service.¹⁰

Now, you might fairly ask, why does this matter and is it a good thing? Or does FTC jurisdiction provide just another layer of government bureaucracy to the Internet access context? The FTC is primarily a law enforcement agency and exercises its jurisdiction mainly by conducting investigations and bringing law enforcement actions. This means that the FTC does not exercise “regulatory” jurisdiction in the sense of economic regulation or industry management. The FTC, along with the Department of Justice Antitrust Division (“DOJ”), has the responsibility to ensure that consumers are protected not *from* markets but *through* markets unburdened by anticompetitive conduct.¹¹ This work is vital to the well-being of the American people. Over the past few decades, the United States has substantially deregulated critical industries, including transportation, telecommunication, and energy, to the substantial benefit of the U.S. economy. As government regulators give way to free markets, much of the responsibility for protecting competition shifts to competition agencies and courts. While

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf. A consolidated appeal of the *Order* is pending in the Third Circuit. *Time Warner v. FCC*, No. 05-4769 (3d Cir. filed Oct. 26, 2005).

¹⁰ The *Wireline Broadband Internet Access Order* permits facilities-based wireline carriers to elect to provide transmission for wireline broadband service on a common carrier basis. The common carrier exemption in the FTC Act may, therefore, preclude FTC jurisdiction over transmission services that a facilities-based wireline carrier elects to provide on a common carrier basis pursuant to the *Order*.

¹¹ The Department of Justice (DOJ) shares antitrust authority with the FTC regarding most sectors of the economy. The two antitrust agencies have long-standing coordination procedures that allow them to avoid inconsistent or duplicative efforts.

competition is distorted when governments regulate or intervene excessively, private actors also can and do distort competition, which is why antitrust and consumer protection enforcement are critical.

To date, our work in this area has included several challenges to ISPs for engaging in allegedly deceptive marketing, advertising, and billing practices.¹² For example, in the matter of *FTC v. Cyberspace.com, LLC*,¹³ the Ninth Circuit recently affirmed the grant of summary judgment in favor of the FTC, finding that the defendants violated the FTC Act by mailing purported “rebate” or “refund” checks in the amount of \$3.50 to millions of consumers and businesses without clearly and conspicuously disclosing that, by cashing the check, those individuals and businesses would receive monthly charges on their telephone bills for defendants’ Internet access services. The Ninth Circuit also upheld the District Court’s award of \$17 million in consumer redress to remedy the injury caused by the defendants’ fraudulent conduct.¹⁴

The FTC also has investigated and brought enforcement actions under the antitrust laws in matters involving access to content via broadband and other Internet access services. For example, the Commission’s complaint in *AOL/Time Warner* alleged that the merger would harm

¹² See, e.g., *In re America Online, Inc. & Compuserve Interactive Servs., Inc.*, FTC Docket No. C-4105 (Jan. 28, 2004) (consent order); *In re Juno Online Servs., Inc.*, FTC Docket No. C-4016 (June 25, 2001) (consent order); *In re WebTV Networks, Inc.*, FTC Docket No. C-3988 (Dec. 8, 2000) (consent order); *In re AOL, Inc.*, FTC Docket No. C-3787 (Mar. 16, 1998) (consent order); *In re CompuServe, Inc.*, 125 F.T.C. 451 (1998) (consent order); *In re Prodigy, Inc.*, 125 F.T.C. 430 (1998) (consent order).

¹³ Nos. 04-35428 & 04-35431, 2006 WL 1928496, at *4 (9th Cir. July 13, 2006).

¹⁴ *Id.*, 2006 WL 1962558, at *1.

competition and injure consumers in several markets, including the market for broadband Internet access, and the market for residential broadband Internet transport services (*i.e.*, “last mile” access).¹⁵ To preserve competition that the merger allegedly would have diminished, the FTC required nondiscriminatory access to the components of the Time Warner system necessary for other firms to compete on an even basis.¹⁶

The FTC has addressed issues of Internet access in a number of other merger investigations, as well as related issues that often arise in horizontal mergers of cable TV systems and vertical mergers of cable TV companies and content providers. For example, the FTC recently investigated the acquisition by Comcast and Time Warner of the cable assets of Adelphia Communications, and a related transaction in which Comcast and Time Warner exchanged various cable systems. The FTC examined the likely effects of the transactions on access to and pricing of content. A majority of the Commission concluded that the acquisitions were unlikely to foreclose competitor cable systems in any market or to result in increased prices for Time Warner or Comcast content, and we therefore closed the investigation.¹⁷

¹⁵ *In re America Online, Inc. & Time Warner Inc.*, FTC Docket No. C-3989 (Dec. 14, 2000) (complaint), available at <http://www.ftc.gov/os/2000/12/aolcomplaint.pdf>.

¹⁶ *Id.* (Apr. 12, 2001) (consent order), available at <http://www.ftc.gov/os/2001/04/aoltwdo.pdf>.

¹⁷ See Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications (Jan. 31, 2006) (FTC File No. 051 0151); *see also* Statement of Commissioners Jon Leibowitz and Pamela Jones Harbour (Concurring in Part, Dissenting in Part) Time Warner/Comcast/Adelphia (Jan. 31, 2006) (FTC File No. 051 0151). Both statements are available at <http://www.ftc.gov/opa/2006/01/fyi0609.htm>. See also *In re Cablevision Sys. Corp.*, 125 F.T.C. 813 (1998) (consent order); *In re Summit Commc’n Group*, 120 F.T.C. 846 (1995) (consent order).

As an important complement to its enforcement activity, the FTC emphasizes consumer education as the first line of defense against fraud, deception, theft, and privacy violations online. Education empowers. Educated consumers are more likely to recognize a phishing email, and more likely to download a spyware detector; they are, in turn, less likely to disclose, expose, or unwittingly share personal information. The FTC offers consumer and business education about a wide variety of Internet-related topics, including Internet access devices, the protection of personal computers from security threats and data intrusion, wireless security, and modem hijacking.¹⁸

The hallmark of our cybersecurity campaign is OnGuardOnline.gov, an innovative multimedia website designed to educate consumers about basic computer security practices. We developed this tool through a partnership with cybersecurity experts, consumer advocates, online marketers, and other federal agencies. OnGuardOnline is built around seven tips about online safety that will remain relevant even as technology continues to evolve. In addition, the site currently hosts modules containing articles, videos, and engaging interactive quizzes – in English and in Spanish¹⁹ – on specific topics, such as phishing, spyware, online shopping, and peer-to-peer file-sharing. Finally, the website provides information about where to get help,

¹⁸ See, e.g., “Detect, Protect, Dis-infect: Consumers Online Face Wide Choices in Security Products” available at <http://www.ftc.gov/bcp/online/pubs/alerts/idsalrt.htm>; “Using Internet Access Products,” available at <http://www.ftc.gov/bcp/online/pubs/alerts/accessalrt.htm>; “Securing Your Wireless Network,” available at <http://www.ftc.gov/bcp/online/pubs/online/wireless.html>; “When Your Computer Calls Overseas Without Your OK,” available at <http://www.ftc.gov/bcp/online/pubs/alerts/modmalrt.htm>.

¹⁹ See <http://AlertaEnLinea.gov>.

ensuring that consumers know that they are not alone as they travel through cyberspace.

III. Policymaking and the Future of the Internet

In all of this work, the worst mistake we can make is to assume that we know it all. Accordingly, at the FTC, we consistently inform our enforcement efforts through robust research and information gathering. Currently, for example, we are engaged in joint public hearings with DOJ, through which we are examining whether and when specific types of single-firm conduct may violate Section 2 of the Sherman Act. At these hearings, which will span more than ten days over a six-month period, we will hear from experienced business people, antitrust practitioners, economists, academics, and others, from the United States and abroad, on a variety of business practices in an effort to inform our enforcement policy under Section 2.²⁰

One of the Commission's most important functions is to study current and emerging marketplace trends to anticipate their significance for consumer protection policy and enforcement. No area of inquiry is more intriguing than the intersection of new technologies and their applications in the global consumer marketplace. This fall, from November 6-9, we will invite an array of experts from around the world to inform us about what they see as emerging trends, applications, products, services, and issues over the next ten years.²¹ We have named these hearings "Protecting Consumers in the Next Tech-Ade", and in the preliminary agenda we are releasing today on our website, www.ftc.gov, you can get a sense of the exciting issues we

²⁰ Information about the Section 2 hearings is available at <http://www.ftc.gov/os/sectiontwohearings/index.htm>.

²¹ Information about the Tech-Ade hearings is available at <http://www.ftc.gov/bcp/workshops/techade/index.html>.

will be exploring, ranging from the future of the Internet to new payment systems. What is the impact for consumers of living in an instant information culture? What does user-generated content mean for marketers? In the next decade, will consumers be able to pay for their groceries by using their phones?

The hearings will be held at George Washington University's Lisner Auditorium – a venue that provides room for all to attend, engage, and learn along with us. Throughout the fall, we will feature live chat, blogs, and other opportunities on the FTC website to learn about and prepare for the hearings. And if you cannot make it to Lisner, the hearings will be webcast. So please accept our invitation to learn and engage with us on these important issues.

A. The Internet Access Task Force

To further develop our expertise in the area of Internet access, I am announcing today that I have formed an Internet Access Task Force. Headed by Maureen Ohlhausen, the Director of the FTC's Office of Policy Planning, this task force, made up of economists and attorneys from throughout the agency, will address important issues that are being raised by converging technologies and regulatory developments. The purpose of the Internet Access Task Force is to educate the Commission on the relevant issues and to inform our enforcement, advocacy, and education initiatives.

Thus far, members of the task force have been drafting an issues paper to educate the Commission about municipalities offering wireless Internet services. The paper, which we expect to release this Fall, will summarize our learning regarding municipal provision of wireless Internet access and provide perspectives on the competition issues that policymakers may

encounter when considering this issue.

B. “Network Neutrality”

I also have asked the Internet Access Task Force to address what is likely the most hotly-debated issue in communications, so-called “network neutrality.” There are reports that the respective factions in this debate have spent more than \$50 million on direct lobbying and advertising.²² “Network neutrality” has been variously defined and may mean different things to different people. On one level, it appears to mean that Internet users should have the freedom to access and use it as they choose, without any restriction by network providers. On another but related level, it means, at a minimum, the right of content providers to unfettered access to the many privately owned networks that comprise the Internet and may also mean that all data transmissions are assigned equal priority as they are passed along from network to network in cyberspace.

Fear of restrictions or discrimination in access has led proponents of “net neutrality” to seek legislation that would, for example, prohibit broadband providers from discriminating against any person’s ability to use a service to access or provide lawful content, from refusing to interconnect facilities with another service provider on reasonable and non-discriminatory terms, or from charging a fee for prioritizing transmission of particular types of data. Opposing such measures are major telecommunications firms, among others.

The proposals address concerns, first, that a firm controlling both broadband transmission facilities and Internet access may discriminate against nonproprietary ISPs or unaffiliated

²² See, e.g., Drew Clark, *Tangled Net*, NAT’L L.J., July 8, 2006, at 29.

providers of applications or content for competitive advantage. Such discrimination might take the form of hampered or blocked transmission aimed at gaining an advantage over competitors in either the horizontal ISP market or the complementary markets for applications and content. In addition, the proposals apparently are designed to address a concern that network operators will charge providers of applications or content for network access, particularly access to higher-speed “lanes” on the Internet. One fear, apparently, is that larger, established firms will be able to pay for prioritized transport, while small, developing firms may not, leading to diminished innovation in applications and content. Implicit in this fear is the assumption that the creation of such fast lanes necessarily will hamper the remainder of the available “lanes” on the Internet.

The FTC’s Internet Access Task Force is looking carefully at the issues raised by calls for network neutrality laws, and I look forward to reviewing their findings. In the first instance, however, I urge caution in proceeding on this issue. I start by admitting my surprise at how quickly so many of our nation’s successful firms have jumped in to urge the government to regulate. I rarely meet a person in business who does not profess support for a free market, who does not long for the government to keep its nose out of the business. But nonetheless, when fear of marketplace disadvantage arises, there is a tendency to quickly turn to government to seek protection or help. I do not dispute the sincerity of the concerns here. I, too, support a highly competitive Internet environment. I just question the starting assumption that government regulation, rather than the market itself under existing laws, will provide the best solution to a problem.

As a government enforcer, I have tried to live by the touchstone of the medical

profession, “first, do no harm.” With that cautionary note, I offer some points that should be considered before enactment of a comprehensive scheme, the impact of which will be felt for many years to come.

1. Demonstrated Harm

The FTC frequently is asked to weigh in on proposed legislation and policies, and we virtually always assert the principle that, absent clear evidence of market failure or consumer harm, policymakers should not enact blanket prohibitions of particular forms of business conduct or business models or place requirements on how business is conducted.²³ Consistently at the federal and state level, we see industry participants seeking legislation that requires a certain class of participants to deal with them in a certain way. Many potential harms are spun out.

But dangers typically lie in legislating without clear evidence demonstrating the problem we wish to solve. Legislating precisely is tough enough; it can be difficult to choose the right words to cover situations that you want to cover, while excluding those you do not – especially given that no one knows what new situations will arise. Legislating without specific factual scenarios as anchors is even more difficult.

Proponents of net neutrality typically cite the Madison River matter in support of their

²³ See, e.g., Letter from FTC Staff to Fla. State Senator Paula Dockery (Apr. 10, 2006), *available at* <http://www.ftc.gov/os/2006/04/V060013FTCStaffCommentReFloridaSenateBill282.pdf> (involving wine direct shipping legislation); Letter from FTC Staff to Mich. State Senator Alan Sanborn (Oct. 18, 2005), *available at* <http://www.ftc.gov/os/2005/10/051020commmihousebill4849.pdf> (involving real estate minimum-service legislation).

arguments for legislation. In that case, a company that provides both Internet access and telephone services allegedly blocked its DSL customers from using rival Voice over Internet Protocol (VoIP) provider, Vonage. Following an FCC investigation, Madison River entered into a consent decree, agreeing to pay a \$15,000 fine and not to engage in such port blocking of VoIP services in the future.²⁴ As troublesome as this conduct may have been, however, I would submit that we should be careful before using the actions of a single broadband provider, apparently facing little competition,²⁵ as a sufficient basis to impose across-the-board regulation.

2. Regulatory Costs

No industry-wide regulatory scheme should be imposed without first carefully weighing the costs, determining whether the greater harm occurs with or without regulation, and evaluating whether a lesser approach than regulatory constraints would be a better way to address the potential harm. The market may not work perfectly all of the time or in every circumstance, but one should not compare results yielded by the market with some hypothetical “perfect” world that is the product of governmental regulation.

Broad regulatory mandates that employ a “one size fits all” philosophy, without regard to specific facts, always have unintended consequences, some which may be harmful and some of which may not be known until far into the future. Even the most thoughtful drafters of

²⁴ See *Madison River Communications, LLC, Consent Decree*, File No. EB-05-IH-0110 (Mar. 3, 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-543A2.pdf.

²⁵ See Thomas M. Lenard & David T. Scheffman, *Distribution, Vertical Integration and the Net Neutrality Debate*, in *NET NEUTRALITY OR NET NEUTERING: SHOULD BROADBAND INTERNET SERVICES BE REGULATED?* 21 (Thomas M. Lenard & Randolph J. May eds., 2006).

legislation cannot foresee all of its effects. Consequently, we should look at whether any net neutrality or similar legislation could have the effect of entrenching existing broadband platforms and market positions, as well as adversely affecting the levels and areas of future innovation and investment in this industry. The end result could be a diminution, rather than an increase, in competition, to the detriment of consumers.

These general concerns about regulation are heightened in the context of broadband Internet access, where the industry to be regulated is relatively young and highly dynamic, and where significant market failure and consumer harm from existing practices has not yet been specifically identified.

3. Market Forces

Also in this policy debate, we should start by acknowledging that competition generally produces the best results for consumers over time. Our free market breeds innovation, creativity, and entrepreneurship at rates unmatched around the world. And markets – particularly dynamic markets – are usually self-correcting. In the Internet space, consumers reign, as best I can tell. Consumers are powerful and tough customers. I ask myself whether consumers will stand for an Internet that suddenly imposes restrictions on their ability to freely explore the Internet or does not provide for the choices they want. And I further ask why network providers would not continue to compete for consumers' dollars by offering more choices, not fewer. We make a mistake when we think about market scenarios simply as dealings between and among companies; let us not forget who reigns supreme: the consumer.

The question, then, is whether we should give the market a chance to work before

stepping in to regulate this still nascent, dynamic industry. What will drive important future decisions about innovation and investment? Who will pick the technological and marketplace winners and losers? Who will determine the most efficient, consumer-friendly broadband platform among DSL, cable modem, fiber-to-the-home, satellite, third-generation mobile wireless, Wi-max, broadband over power lines, or any others that are or will be in the works? How will we address how best to accommodate network congestion caused by increasing utilization of bandwidth-intensive applications and content, such as HDTV, VoIP, and interactive video games? What will drive competition among broadband providers to differentiate themselves in terms of the quality of service, pricing options, and integrated applications and content that they make available to consumers? The important question is whether the market – or the government – will work most effectively to produce outcomes favorable to consumers.

Some might point out, correctly, that not every broadband market in the U.S. is benefitting from vigorous competition. Without question, we should examine markets that lack competition and determine the reason for such market conditions. Are there technical or cost-based issues specific to such markets? Is there insufficient demand to justify a buildout in those areas? Are there unnecessary regulatory barriers to entry or expansion, particularly at the local level?²⁶ Whatever the answers to these questions, we need to consider whether a broad,

²⁶ See U.S. GOV'T ACCOUNTABILITY OFFICE, BROADBAND DEPLOYMENT IS EXTENSIVE THROUGHOUT THE UNITED STATES, BUT IT IS DIFFICULT TO ASSESS THE EXTENT OF DEPLOYMENT GAPS IN RURAL AREAS 18-28 (2006), *available at* <http://www.gao.gov/cgi-bin/getrpt?GAO-06-426> (identifying various cost, demand, technical, and regulatory factors impacting deployment of broadband infrastructure).

nationwide net neutrality law is the best answer to a lack of robust competition in discrete local broadband markets.

4. Existing Agency Oversight

Finally, we should not forget that we already have in place an existing law enforcement and regulatory structure. Before adding to it, we should determine that the current scheme is insufficient to address potential issues as they may arise in this area. Three federal agencies, including the FTC, the DOJ, and the FCC, play a role in protecting competition in this market.

In dealing with the challenges of modern technology, some have been tempted to throw out tried-and-true laws and policies. While enforcing laws in these new markets presents new challenges, most of the fundamental principles of antitrust law and economics that we have applied for years are equally relevant to even the newest industries. Because our analysis, if done properly, is highly fact-intensive, the unique qualities of any product market can be taken into account. Further, competition's role in spurring innovation – that is, in maintaining dynamic efficiency – has secured a central position in antitrust analysis, leading us to take a broader focus that incorporates issues of innovation and progress over time. Whether we are looking at supermarkets or semiconductors, the Commission applies a consistent – dare I say, neutral – analytical framework for antitrust enforcement and consumer protection. The FTC has devoted, and will continue to devote, substantial resources to monitoring market conditions in cyberspace and being alert to any potential harms to competition and consumers.

In addition, the FCC's mandate goes beyond competition and consumer protection. The FCC has adopted a policy statement expressing its strong preference for the kind of connectivity

that network neutrality proponents seek.²⁷ The FCC has expressed that preference through a swift enforcement action in the Madison River matter and through binding conditions on two recent mergers of telephone companies.²⁸ Further, individual FCC Commissioners have stated that the FCC retains authority to impose additional requirements relating to network neutrality.²⁹

In our work, the FTC has coordinated with the FCC and discussed issues where our interests and jurisdictions intersect or where potential mergers implicate each agency's unique mandate. We have worked together effectively in the past and will continue to do so.

While I am sounding cautionary notes about new legislation, let me make clear that if broadband providers engage in anticompetitive conduct, we will not hesitate to act using our existing authority. But I have to say, thus far, proponents of net neutrality regulation have not come to us to explain where the market is failing or what anticompetitive conduct we should challenge; we are open to hearing from them. And we will continue our consumer protection work by, for example, holding ISPs accountable for any false or deceptive representations to consumers concerning the nature of the Internet access provided.

The FTC is committed to maintaining competition and to protecting consumers from

²⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement*, CC Docket No. 02-33 et al. (Sept. 23, 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.

²⁸ See Federal Communications Commission, "FCC Approves SBC/AT&T and Verizon/MCI Mergers," Press Release (Oct. 31, 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261936A1.pdf.

²⁹ See, e.g., Ted Hearn, *Copps on 'Neutrality' Says FCC Has Power to Ensure Nondiscrimination*, MULTICHANNEL NEWS, May 29, 2006, at 1, available at 2006 WLNR 9314889; *Martin Says FCC Has Authority to Enforce Net Neutrality*, TECHWEBNEWS, Mar. 21, 2006, at 1, available at 2006 WLNR 4710624.

deceptive or unfair acts or practices relating to all Internet access services within its jurisdiction.

Thank you for your time today.